American Bar Association Section of International Law and Practice Section of Business Law Report to the House of Delegates The European Community*

RECOMMENDATION

1. **BE IT RESOLVED,** that the American Bar Association ("the Association") supports the European Community's commitment to create a single, integrated market;
2. **BE IT FURTHER RESOLVED,** that the Association urges the European Community to implement measures in such a manner as to ensure effective, non-discriminatory market access for non-EC-based business entities.
3. **BE IT FURTHER RESOLVED,** that the Association further urges that companies organized under the laws of all EC member states (or pursuant to the European Company Statute if such provisions are enacted) are to be treated on an equal basis, without regard to the ultimate beneficial ownership of the company.
4. **BE IT FURTHER RESOLVED,** that measures adopted by the European Community relating to the integration of the legal profession should be designed so as to ensure the preservation of the integrity of the legal profession and the continued recognition of its distinctive characteristics and responsibilities.
5. **BE IT FURTHER RESOLVED,** that measures adopted by the European Community should not impose or permit restrictions upon the delivery of legal services by members of foreign legal professions that are not objectively required for the protection of the public.

REPORT

This report (the "Report") provides background on the five resolutions that the ABA Special Task Force on EC 1992 (the "Task Force"), a joint effort

*This Recommendation and Report was adopted by the House of Delegates in August 1990. The Recommendation and Report was developed by the Section's EC Task Force. Linda Powers and Aaron Schildhaus were primarily responsible. Timothy Dickinson, as well as Robert S. Rendell and Myer Eisenberg from the Section of Business Law, were also instrumental in the development of the Recommendation and Report.

among the various ABA Sections, has submitted herewith for adoption by the House of Delegates. These resolutions express the ABA's support of the program that the European Community has undertaken to complete a single integrated internal market by December 31, 1992, but also express certain concerns identified by the Task Force and call for certain assurances by the EC that United States businesses operating in Europe will not suffer discrimination as a result of the 1992 program. In particular, the Task Force requests confirmation that neither the Community nor any of its Member States will unreasonably restrict foreign legal professionals or discriminate against non-EC-based businesses operating in the Community.

EC 1992 Program

The European Community has its origins in the Treaties of Paris (1951) and of Rome (1957) (collectively, "the Treaty") and presently includes as member states 12 European countries (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, U.K.). A central purpose of the Treaty was to establish a "common market" among its Member States, free of restrictions on the internal movement of goods, people, services, and capital. In its early years, the Community successfully moved to eliminate duties among Member States and establish common customs tariffs with respect to non-member countries. During the recessionary times of the 1970s, however, Member States increasingly resorted to non-tariff trade barriers to protect their national markets against competition not only from third countries but also from other Member States. Other protectionist measures also increased, including restrictions on services, subsidies to domestic producers, and public procurement policies that discriminated against foreign competitors.

By the early 1980s, the Treaty's cumbersome procedures were recognized as an impediment to fully integrating the European market; at the same time, the perceived competitive threat from other markets gave new impetus to the Community's efforts to unify its internal market. As a result, the Member States ratified substantial modifications to the Treaty (these changes were contained in the "Single European Act"), which, to a large extent, was based upon the 1985 study made by the European Commission ("White Paper").

The White Paper set forth a comprehensive framework of nearly 300 legislative proposals to complete the Community's internal market. It classified these proposals under three broad headings:

(1) the removal of *physical barriers* to the free movement of goods and people at internal borders, such as customs and tax formalities for goods and routine identity checks of people;

(2) the removal of *technical barriers,* including differences in product standards, procurement policies, and regulations on services among Member States; and

(3) the removal of *fiscal barriers*, such as the reconciliation of the differing value-added and excise taxes imposed by Member States.

The Single European Act ("Act"), which amended the Treaty of Rome, effective July 1, 1987, formally set December 31, 1992, as the target date for implementation of this program. The Act also provided for the adoption of certain proposals by a qualified majority rather than a unanimous vote of the Community's legislative body, the Council of Ministers. To date the Commission has submitted all of its 282 legislative proposals to the Council. The Council, in turn, has adopted or (by taking a "common position") has given its preliminary approval to nearly two-thirds of these proposals.

With less than 1,000 days remaining before the 1992 deadline, all 12 Member States have implemented fewer than 30 directives and regulations in the 1992 program. The pace of Member State governments has reinforced rather than backed away from their public commitment to the program in response to the recent developments in Germany and Eastern Europe. At the same time, the Community has experienced a swell of mergers and acquisitions, as companies have tried to position themselves to take best advantage of the changing legal and political climate.

When fully implemented, the Community's 1992 program will create a single integrated market of 320 million consumers with a combined gross domestic product nearly as large as that of the United States. Already the Community, taken as a whole, is the United States' largest trading partner. U.S. merchandise exports to EC Member States exceed $75 billion per year, while the annual sales of U.S. companies and their affiliates in the Community amount to approximately $550 billion. Total sales of U.S.-owned companies in the Community are thus three times larger than the sales of such companies to Canada and four times larger than the sales of such companies in Japan.

ABA Special Task Force on EC 1992

Given the significance of the EC market and 1992 program, the Section of International Law and Practice of the ABA first established the Task Force in the Fall of 1988. It was expanded to become a joint effort of the Section of International Law and Practice and the Business Law Section in the Spring of 1989 and soon became an ABA-wide group. One major purpose of the Task Force is to provide a vehicle to bring together expertise among all the Sections, enabling the ABA to make maximum use of its resources in its responses to the EC program. A second major purpose is to facilitate communication in the planning and execution of ABA programs concerning EC developments, so that needless overlap and collisions of programs may be avoided. To achieve these purposes, the Task Force has been structured with 18 working groups, each covering a broad subject area of the EC 1992 program. The resolutions proposed herewith reflect the first concrete efforts of

the Task Force to enunciate the broad principles that may guide the ABA's further responses to European Community developments.

Discussion of Proposed Resolutions

Consistent with the findings of United States government agencies as the Commerce Department and the International Trade Commission, the first proposed resolution would declare the ABA's overall support of the EC 1992 program. Such findings indicate that the 1992 program should generally benefit United States companies doing business in the Community. In the area of technical standards, for example, the Community's proposed harmonization of product testing and certification may allow a U.S. product certified by one Member State to be marketed throughout the Community without design changes or further certification for other Member States. Similarly, effective January 1, 1993, a U.S.-owned financial institution licensed by one member should be able to establish operations in other Member States, subject to certain conditions, without further licensing. Under recently adopted legislation liberalizing Member State restrictions, U.S. businesses should also have greater access in the award of public procurement contracts. These are the kinds of specific benefits that U.S. businesses might realize from the EC 1992 program.

Unfortunately, in some cases, legislation adopted or proposed as part of this program may discriminate against non-EC businesses operating in the Community. A few examples in the areas discussed above are revealing:

- *Product Standards.* U.S. businesses are concerned about the possible transparency in the process by which European agencies develop product standards because non-EC businesses have no influence or standing in this process. Standards may be determined without regard to accepted U.S. or international standards and released without sufficient notice for U.S. businesses to compete effectively with EC companies.
- *Financial Institutions.* While U.S.-owned financial institutions, like their EC competitors, will enjoy a "single banking license" to operate throughout the Community, this benefit is currently subject to certain "reciprocity" provisions. Specifically, access of a U.S. bank to the EC market will depend on the "national treatment and effective market access" that an EC bank is afforded in the U.S. market. This type of reciprocity provisions, which is also being considered for the insurance sector and possibly other service sectors, might be applied to discriminate against U.S. financial institutions.
- *Public Procurement.* Although the legislation adopted to liberalize public procurements may generally benefit U.S. businesses, liberalized access will be available in certain sectors only if the non-EC bidder satisfies a 50-percent EC value-added rule or other similar rules of origin. Such rules of origin in the Community threaten to discriminate against U.S. businesses in a variety of contexts.

In response to the possible discriminatory effect of measures in the EC 1992 program, the proposed second and third resolutions submitted herewith declare two general principles for equal treatment of U.S. and EC businesses. As stated in the second resolution, the Community should generally provide non-discriminatory market access for "non-EC-based business entities." This term would include U.S. companies that do business in the Community only through representative offices, without establishing EC subsidiaries. The proposed third resolution, in turn, would urge such equal treatment of U.S.-owned companies organized under the laws of EC Member States. In either event, the resolutions refer not only to directives and regulations adopted by the Council of Ministers, but also legislation adopted by the Member States to implement directives under national law.

Finally, the proposed fourth and fifth resolutions directly address the potential for discrimination against U.S. and other non-EC legal professionals seeking to provide legal advice in the Community.

To date, two directives have been adopted by the EC which pertain to the delivery of legal services by "lawyers." The two directives are known as the "Legal Services Directive" (1977) and the "Directive on Recognition of Diplomas" (1988).

Legal Services Directive

The Legal Services Directive concerns the provision by lawyers from Member States of legal services in Member States other than those in which they are established. Its basic thrust is to require Member States to recognize as lawyers, for legal services, all professionals included within the definition of a "lawyer" (defined as Rechtsanwalts in Germany; Avocats in France; Barristers and Solicitors in the U.K., etc.), qualified as such in their own Member State (home State) and delivering legal services in another Member State (host State).

Lawyers must be permitted to provide legal advice on the laws of the jurisdiction of the home State, provide counseling services, aid in negotiations, draft documents and represent clients in legal proceedings or before public authorities in the host State under the conditions laid down for lawyers of that State. Host States, however, may require that a lawyer from another Member State work in conjunction with a lawyer who practices within the host State. In such event, the lawyer so engaged must observe all the rules of professional conduct of the host State and must not engage in conduct prejudicial to that lawyer's home State obligations. While pursuing activities other than the representation of clients in legal proceedings or before public authorities, the lawyer also remains subject to the rules of professional conduct in that lawyer's home State.

Directive on Recognition of Diplomas

The second directive is the Directive on Recognition of Diplomas. It essentially provides that the holder of any diploma, formal certificate or other formal

qualifications issued by the competent authorities of one Member State will have the right to practice in his/her profession in any other Member State through the recognition of his/her diploma. The practical effect of this directive, as applied to lawyers, is to enable lawyers admitted in one Member State to be admitted to full practice in any other Member State, with only minimal additional examination and/or apprenticeship.

Draft Directive on Establishment

A third directive on the Right of Establishment is now being studied by the Council of the Bars and Law Societies of the European Community (CCBE) in conjunction with the EC Commission. It would complement the Legal Services Directive by permitting lawyers from one Member State to establish offices in any other Member States for purposes of rendering legal services as permitted under the Legal Services Directive.

By their terms, the various directives and decisions do not apply to lawyers not admitted to practice in Member States. This does not exclude the possibility that either the Community or individual Member States may extend the privileges to other foreign lawyers, whether on the basis of reciprocity or otherwise.

On the other hand, non-EC legal professionals may be subject to additional restrictions. For example, France has considered a policy of strict reciprocity, which would essentially bar all non-EC lawyers not already established in France. Another example is found in a 1982 opinion of the European Court of Justice, which implied that the attorney-client privilege is not available in the Community except in respect of communications with attorneys who are governed by professional rules within the EC.

The position of some of the Member States coupled with the lack of applicability of pertinent directives to third country lawyers provide the foundation for potentially discriminatory treatment of U.S. lawyers engaging in legal activities in Europe on behalf of their clients. Furthermore, the United States is an important element of its broader efforts, in the context of the Uruguay Round of GATT negotiations, to extend unconditional most-favored-nation treatment to the service industries generally, particularly in light of the importance of legal services as a facilitator of trade in other services (as well as goods). The national-treatment and most-favored-nation provisions of the various treaties of friendship, commerce and navigation with EEC Member States are also relevant to this issue.

The fourth and fifth proposed resolutions accordingly urge the Community to eschew restrictions on the delivery of legal services by foreign legal professionals to the extent that these restrictions are not objectively required to protect the public. Obviously, this is an area of great concern to the ABA and the Task Force believes that the views set out in the Resolutions should be communicated to the various EC and Member State officials responsible for such issues.

For the foregoing reasons, the Task Force recommends that the House of Delegates adopt the proposed resolutions submitted herewith.

Respectfully submitted,

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and Practice
and
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